1967

The Equitable Life Assurance Society of the United States, a Corporation v. Alvin R. Walkenhorst and Joyce Walkenhorst, his Wife; Ryder Truck Rental, Inc., a Corporation; Utah Industrial Commission and Utah State Tax Commission : Brief of Appellants

IN THE SUPREME COURT OF THE STATE OF UTAH

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES, a corporation,
Appellee,

vs.

ALVIN R. WALKENHORST and JOYCE WALKENHORST, his wife, RYDER TRUCK RENTAL, INC., a corporation; UTAH INDUSTRIAL COMMISSION and UTAH STATE TAX COMMISSION,
Appellants.

Case No. 10849

BRIEF OF APPELLANTS

Appeal from The Judgment of the Third Judicial District Court
For Salt Lake County
Honorable Leonard W. Elton, Judge

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TABLE OF CONTENTS

Authorities and Statutes Cited

Cases Cited

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STATEMENT OF THE NATURE OF THE CASE

This is an action to foreclose a real estate note and mortgage on a family dwelling located in Salt Lake County, Utah. The mortgagee, engaging primarily in the life insurance business, coupled with their real estate

note the collection of joint life insurance payments by mortgagors who counterclaimed, alleging the mortgage loan was in violation of Chapter 27, Utah Code Annotated, "Unfair of Deceptive Acts and Practices." namely: Title 31-27-2 (1), 14 and 15.

DISPOSITION IN LOWER COURT

This case came on for pretrial before the Honorable Leonard W. Elton, who granted mortgagee's motion for summary judgment on its real estate note and mortgage and dismissed mortgagor's counterclaim. The court did permit mortgagors to amend their pleadings to include the defense of usury.

RELIEF SOUGHT ON APPEAL

Mortgagors, defendants, and appellants seek reversal of the judgment of the lower court whereby their counterclaim, as amended, was dismissed.

STATEMENT OF FACTS

At pretrial it was stipulated between counsel for the respective parties, that the promissory note and real property mortgage which plaintiff, Equitable Life Assurance Society of the United States (hereafter called "Appellee") was seeking to foreclose was executed by Alvin R. Walkenhorst and Joyce Walkenhorst, his wife, (hereafter called "Appellants") in the

complaint was due and owing by appellants provided that appellee was entitled to foreclose its note and mortgage.

Appellee's real estate mortgage note, mortgage, and assignment of policy as collateral security were introduced by its counsel and they were marked as plaintiff's Exhibits 1, 2 and 3, respectively. Appellant introduced the Uniform Real Estate Contract, under which they originally purchased their home, a Joint Ordinary Life policy, a letter dated October 15, 1965, and a letter dated October 25, 1965; all of these documents were furnished the court as part of a Memorandum and were marked as Exhibits 1, 2, 3 and 4 respectively. (R. 82-107).

Appellants Alvin R. Walkenhorst and Joyce Walkenhorst, his wife, on the 18th day of July, 1963, executed and delivered to appellee their promissory note and mortgage in the amount of $11,600.00. The note provided for interest at the rate of 6% per annum and for 300 successive payments of $108.58, which included interest at the aforesaid rate (P. Ex. 1). As security for said note, defendants mortgaged (P. Ex. 2) a home in Salt Lake County which they had purchased on the 21st day of March, 1953, for the amount of $14,000.00. (R. 82-83).

On the 29th day of June, 1963, appellants made an application to appellee for a joint life policy of insurance in the amount of $11,600.00, wherein each appellant named the other appellant as beneficiary in

the event of either appellant's death, and appellee would receive the proceeds of the joint policy to discharge its note and mortgage. On September 1, 1963, Equitable issued a joint policy (See Ex. 2) in the face amount of $11,600.00 which provided for a monthly premium in the amount of $34.34.

Provided appellants paid their note pursuant to its terms, towit: 300 payments of $108.58 each, they would have paid over the twenty-five year period the total sum of $32,574.58. Of the $108.58 payment each month, appellee credited the joint life policy with $34.34 for a total of $10,300.00.

Appellants' first monthly payment of $108.58 pursuant to the terms of the mortgage note was due September, 1963, and appellants paid it timely; they followed with monthly payments thereafter for 24 successive months. Thus, appellants made a total of 24 monthly installments up until the time that appellee claims the default set forth in its complaint.

Appellants, prior to the time they executed the note and mortgage and delivered them to appellee, were told by agents of appellee that the insurance they were purchasing on their lives would: (a) cost them nothing, for the dividends the policy would earn would exceed the premiums over the twenty-fiveyear period of the note and mortgage; (b) that in the event that appellants, after the first year, should miss a payment on the promissory note, that appellee would automatically borrow on appellants' joint life policy, and that

sums borrowed by appellee, appellants could repay at their convenience, incurring a nominal interest charge; and (c) that appellants could not obtain a home mortgage from appellee unless appellants agreed in advance to purchase a joint life policy. (R. 76). Appellants relied upon the aforesaid material representations by agents of appellee.

Appellants' default under the terms and conditions of their note and mortgage, occurred, if at all, on the 2nd day of October, 1965, the thirty-first day after defendants failed to remit a monthly payment. In addition, appellee claimed there were some unpaid accrued taxes and special assessments. However, appellants, but for the filing of this action, were ready, willing and able to satisfy these arrearages.

Appellants, through their attorney, attempted to remedy any default by remitting two monthly payments, to wit: $218.45 (see Ex. 3) which was refused on October 29, 1965, unless certain conditions precedent were met (see Ex. 4, R. 103-106).

Appellee's note and mortgage provides for a thirty-day grace period from the due date of each monthly installment. Exhibit 2, the joint policy, issued August 31, 1964, had accumulated a cash or loan value on October 2, 1965, the date of the alleged default, in the amount of $150.00 (see page 18 of Exhibit 2, R. 95). Had appellee kept its promise to appellants to borrow from the joint life policy, the alleged default by appellants would have been automatically cured.

On October 27, 1965, appellee refused to accept a tendered check for the arrearage due, but provisionally would permit appellants to pay their arrearage on the note and mortgage provided they continued keeping the joint life insurance policy in force; pay special assessments, taxes, if any, legal fees, court costs, and further furnish a *letter of estoppel* for the protection of appellee. (R. 195, 106).

In fact, had appellee transferred the amount appellants had accumulated under the joint policy, there would have been no default at all on the part of appellants, for on the 2nd day of October, 1965, defendants had a cash or loan value under the joint policy of insurance of $150.00 (see page 10 of Exhibit 2). The tender by counsel for defendants on October 15, 1965, would have been tantamount to payment in advance.

On the 8th day of December, 1966, this matter came on for pretrial, and the appellee moved the Court for a summary judgment (R. 49) and for a judgment dismissing the counterclaim as contained in the answer of the appellants. Attorney for the appellants prepared and filed a Memorandum of Authorities pursuant to leave of Court, and on January 27, 1967, the court having heard the arguments of counsel as to the proper Findings of Fact and Conclusions of Law to be entered herein, and over the objection of appellee's attorney, granted the motion for leave to amend the answer heretofore filed to set forth the additional defense of usury (R. 50).

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN GRANTING APPELLEE'S MOTION FOR A SUMMARY JUDGMENT .

The application of Rule 56 of the Utah Rules of Civil Procedure presupposes the following:

> 1. The party against whom the motion is made is entitled to all the favorable inferences which may reasonably be drawn from the facts, and if when so viewed reasonable men might reach different conclusions, the motion should be denied, *Bohn Aluminum & Brass Corp. v. Storm King Corp.*, 303 F.2d 425 (6 Cir. 1962).
>
> 2. All doubts as to the existence of a genuine issue regarding material facts must be resolved against the party moving from summary judgment. *Toebleman v. Missouri-Kansas Pipe Line Co.*, 130 F.2d 1016 (3 Cir. 1942).
>
> 3. Where conflicting inferences may be drawn from the facts presented, summary judgment may not be granted. *Holden v. United States,* 186 F.Supp. 76 (D.C.N.Y. 1960).

Appellants set forth in their Memorandum of Authorities the facts which they alleged they would prove at a trial. These facts if established would place into issue whether or not appellee, in selling its insurance, had made certain prohibited representations, and further, failed to keep their oral representation in connection with the applications of insurance reserves to be

applied on loan payments. Appellees would necessarily have to challenge the foregoing facts and resolve the issues raised in its favor; otherwise, it would follow that it had breached its own oral contract with appellants and sought their foreclosure prematurely.

POINT II

IT WAS UNLAWFUL AND IN VIOLATION OF THE INSURANCE CODE OF THE STATE OF UTAH FOR APPELLEE TO TIE TOGETHER, AS IT DID, THE REAL ESTATE LOAN PREDICATED UPON APPELLANT'S PURCHASE OF ITS INSURANCE.

Utah Code Annotated, 1953, Chapter 27, provides as follows:

> "31-27-2. CERTAIN CONTRACTS, UNDERSTANDINGS OR COMBINATIONS FORBIDDEN — ENFORCEMENT OF COMMISSIONER'S ORDERS. — (1) No person shall either within or outside of this state enter into any contract, understanding, or combination with any other person to do jointly or severally any act or engage in any practice for the purpose of
>
> "(c) establishing or perpetuating any condition in this state detrimental to free competition in the business of insurance or injurious to the insuring public.
>
> "31-27-14. INDUCEMENTS, UNFAIR DISCRIMINATION, REBATES PRO-

HIBITED. - (1) (a) No insurer or any employee thereof, and no agent, broker, or solicitor shall pay, allow or give or offer to pay, allow to (or) give, directly or indirectly, as an inducement to insurance, or after insurance has been effected, any rebate, discount, abatement, credit or reduction of the premium named in a policy of insurance, or any special favor or advantage in the dividends or other benefits to accrue thereon, or any valuable consideration or inducement whatever, not specified in the policy, except to the extent provided for in an applicable filing which is in effect as provided in chapter 18 of this code.

"31-27-15. OFFERING SECURITIES, CONTRACTS, GOODS, MERCHANDISE OR SERVICES AS INDUCEMENTS. — No insurer, agent, broker, solicitor, or any other person, shall, as an inducement to the purchase of an insurance or annuity contract, or in connection with any insurance transaction, provide in any policy for, or offer, or sell, buy, or offer or promise to buy or give, or promise, or allow, in any manner whatsoever:

> "(2) Any special advisory board contract, OR OTHER CONTRACT, agreement, or understanding of any kind, offering, providing for, or promising any profits or special returns or special dividends, or
>
> "(3) Any prizes, goods, wares, or merchandise of an aggregate value in excess of one dollar, or . . . " (Emphasis added).

This court has not had occasion to interpret the above statutes as they may apply to appellants' theory of this case, however, the language appears to be clear

and not amenable to any other interpretation than that which is ordinarily attributed to the language set forth above as quoted.

In connection with Section 31-27-1(c), the offering of real estate loans to residents of Utah by appellee which is known to be one of the largest insurance companies in the world with insurance in force and millions of dollars of assets, is clearly an attempt to establish or perpetuate a condition which is detrimental to free competition of insurance in this state, and detrimental to the insuring public.

31-27-15(a) expressly prohibits the giving by appellee of any such special favor or advantage in connection with the sale of its insurance.

Appellee's agreement to lend $11,600.00 payable over a 25-year period at 6% annual interest is clearly a special favor or advantage or valuable consideration or inducement to gain insurance business through the use of its multi-million dollar treasury.

31-27-14 (2) and (3) prohibits an insurer to offer promises, give or allow in any manner whatsoever, any ***OTHER CONTRACT, AGREEMENT OR UNDERSTANDING OF ANY KIND PROVIDING FOR OR PROMISING ANY PROFITS OR SPECIAL RETURNS.*** The lending of $11,600.00 to finance defendants' home in connection with the sale of insurance, as was done in this case is prohibited, and such contracts are void.

POINT III

APPELLEE'S INCLUSION OF INSURANCE PREMIUMS IN ITS PROMISSORY NOTE EXECUTED AND DELIVERED BY APPELLANTS IN CONNECTION WITH THE FINANCING OF THEIR HOME IS UNLAWFUL.

It is clear that appellee is prohibited from soliciting insurance wherein it offers as an inducement a mortgage loan. It follows, that as a legal consequence of appellee's collecting 24 payments of $34.34 each, it must credit this amount as advance payments on its mortgage loan, otherwise, appellee's note and mortgage would be in violation of Utah usury laws, namely, Section 15-1-2, wherein it provides that maximum interest for the loan of money, goods, things in action, shall not exceed 10% per annum.

Thus, at the time of the alleged default by defendants, they had, in fact, prepaid $824.16 and were not in default. If the aforesaid payments are not credited as advance payments on the note and mortgage, then the legal conclusion is that appellee has embarked upon a usurious contract with appellants and pursuant to Section 15-1-17, UCA, all interest is forfeited and defendants are entitled to treble such payments as unlawful interest payments, and be awarded their costs and attorney fees. See *National vs. Bayou Country Club*, 16 Utah 2nd 417, and 403 Pac. 2nd 26.

POINT IV

ACTS AND CONTRACTS IN VIOLATION OF SECTIONS 31-27-2 (1), 31-27-14 (1) (a) AND 31-27-15, UCA, ARE PROHIBITED AND RENDER SUCH ACTS AND CONTRACTS VOID AB INITIO.

Appellee's promissory note and mortgage are void ab initio for they were executed as part of the insurance contract which is void as a matter of law. The note and mortgage, which were marked and admitted at pretrial, provide for the payment of insurance premiums as well as appellee's money loaned and cannot be separated.

This court announced long ago in *Baker v. Latses* 60 Utah 38, 206 P. 553:

> "It is the generally accepted doctrine of this country that every contract in violation of law is void. It is equally true that our courts will not lend their aid to the enforcement of nor permit a recovery of compensation under, contract made and entered into in violation of law prohibiting them or declaring them to be unlawful."

Appellee has no right to foreclose its mortgage and note in this matter. In fact, they have no security and their action should be limited to money had and received by appellants.

POINT V

THE LIFE INSURANCE POLICY WAS

NOT REGISTERED AND DELIVERED TO APPELLANTS UNTIL AFTER SEPTEMBER 1, 1963. HENCE APPELLANTS ARE NOT BOUND BY THE TERMS OF THEIR WRITTEN ASSIGNMENT AND EQUITABLE IS BOUND BY THEIR AGENT'S REPRESENTATIONS.

Appellants were required to assign as collateral for their mortgage loan their joint life policy. See plaintiff's Ex. 3 attached hereto and made a part hereof by reference. The joint life policy, Exhibit 2, shows on its face that it was registered September 1, 1963.

Appellants could not assign their policy until Equitable had processed their application and issued a policy. The assignment was executed contemporaneously with the note and mortgage.

The representations by appellee's agent that appellee would automatically borrow on the policy in the event of appellants' missing a payment, is controlling, notwithstanding appellee's position that the written assignment controls the rights between the parties for the following reasons:

(1) The assignment is void as a matter of law for reasons set forth in Point III, and

(2) Appellants could not assign a policy of insurance not in being.

CONCLUSION

It is respectfully submitted there are substantial unresolved disputed questions of material facts which require a trial. However, on the face of the documents presented by appellee, it would appear proper and reasonable for this court to hold as a matter of law that the note, mortgage, assignment of insurance policy, and the joint life policy itself are all void and require appellee to amend its complaint for an action based upon money had and received.

Respectfully submitted,

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